(3)

No. 91-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE TAX SECTION, SOUTH CAROLINA BAR IN SUPPORT OF PETITIONERS

SCOTT Y. BARNES *
HOLMES & THOMSON
P.O. Box 858
Charleston, SC 29402
(803) 723-2000

WILLIAM J. QUIRK
UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF LAW
Columbia, SC 29208
(803) 777-4155
Counsel for the Amicus

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1697

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF THE TAX SECTION, SOUTH CAROLINA BAR IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners. Petitioners have consented to the filing of the brief. The consent of the Respondents was requested but refused.

INTEREST OF *AMICUS*

Amicus is the Tax Section, South Carolina Bar. The South Carolina Bar is an association established under Rule 410 of the South Carolina Appellate Court Rules. Every person admitted to the practice of law in South Carolina is required to be a member of the South Carolina Bar. There are currently 7483 members of the South Carolina Bar. The Tax Section of the South Carolina Bar was established by the House of Delegates of the South

Carolina Bar on January 7, 1982. It currently has 241 members.

One of the issues presented in this case—whether Petitioners utilization of S.C. Stat. Ann. § 12-47-440 precluded the refund of South Carolina income taxes erroneously, improperly or illegally paid to the South Carolina Tax Commission is of vital importance to all South Carolina taxpayers. For over thirty (30) years South Carolina taxpayers have relied on the provisions of § 12-47-440 as the procedural remedy available to bring an action in state court for the refund of taxes, including income taxes erroneously, improperly or illegally assessed, collected or otherwise paid over to the South Carolina Tax Commission. The holding by the Supreme Court of South Carolina that the provisions of § 12-47-440 are not available to South Carolina income taxpayers leave South Carolina income taxpayers without an adequate remedy in which to claim erroneously, improperly or illegally collected income taxes. *Amicus* which has a duty to insure that the tax laws of the State of South Carolina are correctly interpreted, has a compelling and vital interest in the proper resolution of the question presented. Accordingly, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of the Petitioners.

Respectfully submitted,

SCOTT Y. BARNES *
HOLMES & THOMSON
P.O. Box 858
Charleston, SC 29402
(803) 723-2000

WILLIAM J. QUIRK
UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF LAW
Columbia, SC 29208
(803) 777-4155
Counsel for the Amicus

* Counsel of Record

QUESTION PRESENTED

1. Did the Supreme Court of South Carolina err in holding that S.C. Stat. Ann. § 12-47-440 is not a general refund statute, but instead applies only to license type fees and taxes?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1697

FRANCIS EDWIN BASS, JR., *et al.*,
Petitioners,

v.

STATE OF SOUTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

---

BRIEF *AMICUS CURIAE* ON BEHALF OF THE TAX SECTION, SOUTH CAROLINA BAR IN SUPPORT OF PETITIONERS

ARGUMENT

S.C. CODE ANN. § 12-47-440 WAS ENACTED TO PROVIDE SOUTH CAROLINA INCOME TAXPAYERS WITH A SIMPLE METHOD OF RECOVERING TAXES WRONGFULLY COLLECTED

In 1960, upon the recommendation of the South Carolina Tax Study Commission, the South Carolina legislature enacted § 12-47-440. At that time, the Tax Study Commission reported to the legislature that it recommended an "equitable system for submitting claims for refunds for taxes and license fees" illegally collected. (The 1960 Report of the Tax Study Commission is attached as Appendix A.) The new system would allow taxpayers judicial review "without vast technicality." The existing refund procedure, the Tax Study Commission found, resulted in the "[d]eprivation of the rights of individuals."

The new remedy, which the Tax Study Commission hoped would cure existing abuses was, "a claim for refund, required to be filed within three years of the date the tax was originally due, with an appeal to the Court of Common Pleas within thirty days of notice of denial by the Tax Commission." It is clear from the explanation contained in the Tax Study Commission's report that § 12-47-440 applies to all taxes including income taxes.

Since 1960 South Carolina income taxpayers have routinely filed with the South Carolina Tax Commission claims for refunds under § 12-47-440. See, Boyle and Von Lehe, South Carolina Income Taxation, Third Edition (1987), I-2. Since 1960, the South Carolina Tax Commission itself has accepted and even advised South Carolina income taxpayers to file claims for refund under § 12-47-440 (see Appendix B attached hereto).

The Supreme Court of South Carolina holding that § 12-47-440 is not a general refund statute, but instead applies only to license type fees and taxes leaves South Carolina income taxpayers who have erroneously paid income taxes to the State of South Carolina without a remedy at law. This result is contrary to the plain language of the statute and is not what the Tax Study Commission or the South Carolina Legislature intended in 1960 when the predecessor to § 12-47-440 was enacted.

Respectfully submitted,

SCOTT Y. BARNES *
HOLMES & THOMSON
P.O. Box 858
Charleston, SC 29402
(803) 723-2000

WILLIAM J. QUIRK
UNIVERSITY OF SOUTH CAROLINA
SCHOOL OF LAW
Columbia, SC 29208
(803) 777-4155
Counsel for the Amicus

* Counsel of Record

APPENDICES

APPENDIX A

FIRST ANNUAL REPORT

of the

SOUTH CAROLINA TAX STUDY COMMISSION

to the

1960 GENERAL ASSEMBLY

COLUMBIA, SOUTH CAROLINA

January, 1960

VI. IT IS RECOMMENDED that an equitable system for submitting claims for refund for taxes and license fees improperly, illegally or erroneously assessed or collected be instituted, and that the claimant be granted, without vast technicality, judicial review of adverse holdings by the Tax Commission. A three year statute of limitations is recommended. See Exhibit M for recommended legislation.

Present Provisions: There are presently three routes which a taxpayer may take in order to seek recovery of taxes or license fees he deems improperly paid over to the State. Two of these dead-end with the Tax Commission. The third is so fraught with technicality and expense as to be practically unavailable for the vast majority of taxpayers. First, the Tax Commission may on its own motion any time within five years revise downward an assessment. (See Section 65-322.) No appeal is available from a denial by the Commission, and, since there is no way to receive a partial refund "under protest", a taxpayer's remedy ends at the Tax Commission. (But see Sections 65-2681, 65-2682 and 65-2683 which prescribe no time limit for relief.) Second, where income taxes are involved a taxpayer may apply to the Tax Commission within one year of payment for a revision of an assessment. (See Section 65-327.) The Tax Commission, within its discretion, may or may not grant the request. Here again there is no judicial review. The last method provided is available only to a taxpayer who realizes in advance of payment that he will claim a refund. In this circumstance an appeal is available only where: (1) the tax is paid under protest and (2) within thirty days a formal summons and complaint against the Commission is served in the Court of Common Pleas. (See Sections 65-2661 and 65-2662.)

Explanation: Deprivation of the rights of individuals is not new in administrative proceedings but, rather, is widespread. This is usually explained away as mandatory

for the proper functioning of the machinery. The Commission was unimpressed by this argument and inclined toward the conclusion that restrictive appeal procedure with respect to administrative bodies likely has its roots in "convenience of the members of the administrative body". While neither abuse of authority nor autocratic method and manner is laid at the doorstep of the Tax Commission, nonetheless, no one can deny that, w .hout the two basic and essential safeguards set out here, abuse can occur, and must almost necessarily occur somewhere off in the future. And, be aware of this, the man who is most vulnerable is not the more susbtantial taxpayer necessarily but, in the opinion of the Commission, is the one who cannot afford the expense of litigation, and who alone cannot walk gingerly down the tight-rope of technicality.

Any administrative agency existent, when its prerogatives are attacked, if it is worth its salt, will offer endless reasons and objections to any proposed reform measure; point out the dire consequences that will result, and show by charts, graphs and other statistics how wonderfully the system in effect has operated through the years. The fact of the matter is, the loudest objector to procedural reform will always be that administrative agency least able to stand the spot light of publication and judicial review.

The system recommended here is simply a claim for refund, required to be filed within three years of the date the tax was originally due, with an appeal to the Court of Common Pleas within thirty days of notice of denial by the Tax Commission. The appeal it is suggested may be taken in the county of residence of the claimant or in Richland County at the election of the claimant. The restriction to three years here would not affect in any way the Tax Commission's authority to assess deficiencies within a five year period. Nor, would uncertainty of revenue result, for, we are informed, under provisions

permitting adjustments in assessments within five years, the Tax Commission has made refunds in all worthy cases. If this be true, then to provide the safeguard recommended, no substantial effect on the revenue could result; if this not be true, then the case for judicial review is proved.

VII. IT IS RECOMMENDED that statutory provision be made for extension of time for filing income tax returns and franchise tax returns; that refunds of taxes be limited to those of one dollar or more in amount; that the requirement that the Tax Commission publish all refunds made be eliminated; and that double withholding be avoided. See Exhibit N for recommended legislation.

Present Provision: There is no statutory authority available to authorize the granting of extensions of time for filing income tax returns and franchise tax returns. Refunds are required to be published annually in the Tax Commission's report. Withholding can presently be instituted by two states on the same earnings with respect to a legal resident of South Carolina who works in a second state.

Explanation: Statutory provisions for the granting of extensions for the filing of income tax and franchise tax returns do not exist. These would now be instituted. There is no logical reason to continue to publish all refunds made by the Tax Commission, particularly now with the withholding of income taxes in effect and the prospect of refunds numbering several hundred thousand. To limit refunds to one dollar or more is an administrative aid designated to simplify one of the problems which will arise under withholding. Withholding also brings in the possibility of double withholding where a South Carolina resident works in another state and where this second state has withholding. The recommended provision would permit the Tax Commission to exempt an employer from withholding where double withholding would result.

EXHIBIT M

A BILL

To Amend the Code of Laws of South Carolina, 1952, so as to Provide a Three Year Statute of Limitations for Filing Claims for Refund of License Fees and Taxes, and to Provide for Appeals to the Circuit Courts.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The Code of Laws of South Carolina, 1952, as amended, is further amended by adding a new section to be known as Section 65-2686, to read as follows:

"Section 65-2686. Notwithstanding any other provisions of this title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this title has been erroneously, improperly, or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf said license fee or tax was paid. may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission. after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, said taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining said abatement or refund, bring an action against the Commission for recovery of said license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for herein is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an

additional license fee or tax is assessed and paid. Such action shall be brought in the Court of Common Pleas for Richland County except that a resident of this State may elect to bring said action in the Court of Common Pleas for the county of his residence.

A taxpayer or licensee who brings an action provided for in Sections 65-2661 and 65-2662 shall be considered as having elected his remedy and is denied the benefits of this Section."

SECTION 2. All acts or parts of acts inconsistent herewith are repealed.

SECTION 3. This act shall take effect upon approval by the Governor, and apply to taxes or license fees paid or assessed after December 31, 1959.

APPENDIX B

SECTION IV
INDIVIDUAL INCOME TAX RETURNS

GENERAL INSTRUCTIONS
RESIDENT, NONRESIDENT, PART-YEAR RESIDENT

SHOULD I FILE A SOUTH CAROLINA INCOME TAX RETURN?

Were you required to file a federal income tax return which included income taxable by South Carolina?

Did you have South Carolina income tax withheld from your wages?

Are you a nonresident or part-year resident with income taxed by South Carolina?

If you answered YES to any one of the questions above, file a South Carolina income tax return.

AM I A RESIDENT OR A NONRESIDENT?

The following definitions will help you decide:

You are a South Carolina resident, even if you live outside South Carolina, when:

1. You think of South Carolina as your permanent home; AND
2. South Carolina is the center of your financial, social and family life; AND
3. When you are away, South Carolina is the place to which you intend to return.

You are a nonresident if your permanent home is outside South Carolina all year and none of the above applies to you.

WHAT IS MY STATUS IF I MOVED INTO OR OUT OF SOUTH CAROLINA IN 1989?

You are a part-year resident.

As a part-year resident, you may consider yourself a full-year resident or a nonresident.

If you elect to be a full-year resident, file the resident Form SC1040 (Long Form). Report all your income as though you were a resident for the entire year. You will be allowed a credit for taxes paid to another state.

If you elect to be a nonresident, file the nonresident form, SC1040NR. You will be taxed only on income earned as a resident in South Carolina and will prorate your deductions and exemptions.

You may choose the way that is most advantageous to you.

I AM A FULL-YEAR SOUTH CAROLINA RESIDENT BUT MY SPOUSE IS NOT. HOW SHOULD WE FILE?

If you both file a joint federal return, you must file a joint South Carolina Return SC1040NR (Nonresident Form). The resident spouse will report to South Carolina all income for the entire year. The spouse that is not a resident on the joint return will only report income earned in this state, if any.

If you both file separate federal returns, you must file a separate South Carolina return. Your spouse must also file a separate South Carolina return if he/she has income taxable by South Carolina. See "What Form Do I Use?"

I AM IN THE ARMED FORCES. WHAT IS MY RESIDENCY STATUS?

South Carolina Resident

If you enter the armed forces when you are a South Carolina resident, you do not lose your South Carolina residency status, even if you are absent from this state on military orders. You are subject to the same residency requirements as any other South Carolina resident and are required to file a South Carolina income tax return (SC1040 or SC1040A).

Nonresident

If you are not a South Carolina resident but are stationed in this state by military orders, your military income is not subject to South Carolina tax. However, if you have income subject to South Carolina tax, file Form SC1040NR. South Carolina DOES tax other income earned in this state by you or your spouse.

WHAT FORM DO I USE?

Use FORM SC1040A (Short Form) if all of the following apply to you:

- You are a full-year South Carolina resident.
- Your income is only from wages, interest, ordinary dividends or unemployment.
- You have no adjustments to your federal taxable income for South Carolina purposes.
- Your federal taxable income is less than $50,000.

Use FORM SC1040 (Long Form) if any one of the following applies to you:

- You itemized your deductions on your federal return.
- You paid estimated tax to South Carolina in 1989.

- You claimed tax credits on Schedule TC.
- You have any adjustments to your federal taxable income as discussed in the instructions.
- You are a part-year resident who elects to file as a resident.

Use FORM SC1040NR if any one of the following applies to you:

- You are a part-year resident electing to file as a nonresident.
- You are a nonresident.
- One spouse is a full-year resident and the other spouse is a nonresident.

WHEN SHOULD I FILE MY RETURN?

RETURNS FOR CALENDAR YEAR 1989: file on or before April 16, 1990.

RETURNS FOR FISCAL YEAR TAX PERIODS: due on or before the fifteenth (15th) day of the fourth month following the close of your tax year. Identify the fiscal year period at the top of the return in the space provided and write "FISCAL" in large letters across the face of the return.

NEED MORE TIME TO FILE?

If you need more time to file your South Carolina return, note the following:

- If you will receive a refund of state taxes, South Carolina will allow you the same length of time that is allowed by your federal extension.
- When you file, simply attach a copy of your federal extension form to your South Carolina return.

If you need more time to file your South Carolina return and you owe additional tax:

- Attach payment of taxes due to South Carolina to a separate copy of your federal extension or to South Carolina extension Form SC4868.
- To avoid penalty and interest, mail any tax due by April 16, 1990.
- Enter the amount you paid with your extension on Form SC1040 (Long Form), line 17, or SC1040 NR, line 12.

BE SURE TO ATTACH A COPY OF EITHER YOUR FEDERAL EXTENSION OR SOUTH CAROLINA EXTENSION TO YOUR SOUTH CAROLINA RETURN WHEN YOU FILE.

MORE TIME TO FILE DOES NOT MEAN MORE TIME TO PAY YOUR TAXES!

You will owe interest from April 16, 1990, to date of payment. A penalty may also be charged after April 16th if an additional amount is required. To avoid the penalty, you must: 1) pay at least ?0% of the tax by April 16, 1990, and 2) Pay the additional balance due if, any, within the extended time period. In the case of a failure to file within sixty days of the due date the penalty will not be less than the lesser of one hundred dollars or the amount of the tax due.

I AM GETTING AN INCOME TAX REFUND THIS YEAR. WHEN WILL I GET MY CHECK?

Returns which are filed early are processed before and usually more quickly than returns filed closer to April 16. Ordinarily, within ten weeks after we receive your complete return we will mail your refund check. Therefore, allow at least ten weeks for your refund to arrive before you contact us.

IS THERE ANYTHING I CAN DO TO HELP YOU PROCESS MY RETURN CORRECTLY AND SEND MY REFUND FASTER?

Yes, there are several things you can do:

- File as early as possible.
- Affix the address label (corrected, if necessary) to the name and address area of your return.
- Check your return to be sure that you have filled in all necessary information, that your calculations are accurate, and that it is legible.
- Comply with the check list on the envelope.
- Check the appropriate block (Refund; Tax Due; or No Refund, No Tax Due) on the envelope. Checking the wrong block or no block may slow processing.

ROUND OFF CENTS TO THE NEAREST WHOLE DOLLAR.

You must round off cents to the nearest whole dollar on your return and schedules. You must drop amounts less than 50 cents. Increase amounts of 50 to 99 cents to the next dollar. For example: $2.15 becomes $2.00; $4.75 becomes $5.00; and $3.50 becomes $4.00.

WHAT TAX RECORDS DO I NEED TO KEEP?

Keep a copy of your return. Also, keep the original or a copy of any papers or statements you used to prepare your return. Keep your records that support an item of income or a deduction appearing on a tax return until the statute of limitations for the return runs out. The statute of limitations is generally THREE YEARS from the date the return was due or filed, whichever is later.

Save any records concerning property, home, stocks, and business property you bought and may sell later. The

records kept should show the purchase price, date, and related cost; and for real property: cost and date of improvements. Your return may be audited by the IRS or the South Carolina Tax Commission. If audited, the law requires you to show proof of your income, expenses, and cost of assets.

WHEN SHOULD I FILE AN AMENDED SOUTH CAROLINA RETURN?

File Form SC1040X (Amended Return) any time you need to correct your South Carolina return. If you amend your federal return, usually you will need to amend your state return.

PRIOR YEAR REFUNDS

You may apply for a refund on either an amended or delinquent return within three (3) years of the original due date of the return. Refunds will not be issued for requests received more than three (3) years after the original return's due date.

REFUNDS OFFSETS

The Tax Comission assists in the collection of debts owing to South Carolina colleges for the repayment of student loans, debts owing to entities of the State of South Carolina and debts owing to the Internal Revenue Service. The Tax Commission may set off any refunds due the debtor by the amount certified by the claimant agency as delinquent debt. Reviews of refund setoffs are with the claimant agency.

WHAT IF I AM AUDITED BY THE IRS?

If you receive a refund or owe additional federal tax, file an amended South Carolina return after the federal audit report becomes final.

ESTIMATED TAX YOU PAID FOR THE 1989 TAX YEAR

Estimated tax is the amount of tax you prepaid on your 1989 income tax. Include any amount you credited from your refund on the 1988 South Carolina individual income tax return.

WHO MUST FILE A DECLARATION OF ESTIMATED TAX?

Generally, you must file a Declaration of Estimated Tax, Form SC1040ES, for 1990 if you estimate that your tax will be $100 or more and that the total amount of income tax that will be withheld will be less than the lesser of:

1. 90% of the tax to be shown on your 1990 income tax return, or
2. 100% of the tax shown on your 1989 income tax return (if your 1989 return covered all 12 months of the year).

Wage earners who do not have enough tax withheld from their wages must file a Declaration of Estimated Tax for the year. You have two methods for paying:

1. increase the amount your employer withholds from your wages, or
2. pay estimated tax in addition to the usual amount withheld from your wages.

Self-employed people who do not have South Carolina tax withheld from their income must file a Declaration of Estimated Tax for the year.

Recipients of taxable pensions and annuities who do not have at least 90% of their South Carolina income tax liability withheld must file a Declaration of Estimated Tax for the year.

WHO DOES NOT HAVE TO FILE A DECLARATION OF ESTIMATED TAX?

Farmers and commercial fishermen do not have to file a declaration if at least two-thirds of their gross income is from farming or fishing.

HOW DO I FILE ESTIMATED TAX?

Complete a South Carolina Declaration of Estimated Tax form (Form SC1040ES). The South Carolina Tax Commission mails declaration vouchers to taxpayers who may need to pay estimated tax based on past estimates. If you need to file but did not get your vouchers, contact the South Carolina Tax Commission.

MOVING?

Let us know your new address. Write to: South Carolina Tax Commission, Office Services Division, P.O. Box 125, Columbia, South Carolina 29214.